NINE

HITLER'S WILLING LAW PROFESSORS

OREN GROSS

"The dagger of the assassin was concealed beneath the robe of the jurist."[1]

I. INTRODUCTION: HERR SAUL LANDE AUS WARSCHAU

On November 12, 1938, three days after Kristallnacht, the Faculty of Law of the University of Leipzig awarded a doctoral degree in law. The new doctor had studied in Leipzig between 1926 and 1933 and wrote his dissertation under the supervision of Professor Paul Koschaker, the great Roman law scholar. Yet that particular doctorate was anything but ordinary, for the university bestowed this highest degree on a Jewish student. Signed by the Dean of the Faculty of Law, Professor Hans Oppikofer, and stamped with the seal of the university, bearing the formal symbol of the Nazi party, an eagle atop a swastika, the certificate conferred on "Herrn Saul Lande aus Warschau" the degree of *Doktor der*

In memory of my great-grandparents Yossef and Ester and my great-uncles and aunt Arie-Leib, Yehuda-Tsvi, and Haya and their families from Lesko (Linsk) Poland, who were murdered in the Belzec extermination camp in 1942. May their souls be bound up in the bond of life. Earlier drafts of the work were presented at the Center for Ethics, Emory University; the Legal History Workshop, University of Minnesota Law School; the University of Minnesota Law School's Faculty Works in Progress; and the 2020 American Society of Comparative Law Annual Meeting. I have benefited greatly from the comments of all the participants in those. I have particularly benefited from comments, suggestions, and insights by David Abraham, Arnon Gutfeld, Eric Weitz, Adam Levitin, Andreas Zimmerman, Bernard Levinson, Robert Ericksen, Scott Dewey, Ryan Greenwood, Hubert Lang, Edward Queen, Achilles Skordas, and Deborah Lipstadt. Of course, all errors remain my own.

1. Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10: Nuernberg, October 1946–April 1949, vol. 3, "The Justice Case" (The United States of America v. Altstoetter et al.) (Washington, DC: United States Government Printing Office, 1951), 985.

Rechte.[2] Thus, Lande became the last Jew to be awarded a doctorate in law (and presumably the last Jew to be awarded a doctorate in any academic discipline) by a German university prior to World War II.[3] Not less amazing is the fact that the doctoral work, entitled *Teilunwirksamkeit letztwilliger Verfügungen* [Partial Inefficacy of Testamentary Dispositions], was published in 1938 in Dresden by M. Dittert and Co.[4] Indeed, the University of Leipzig awarded Lande his doctorate, and the work was published, possibly in absentia.[5] Lande had already escaped from Nazi Germany and settled in Palestine in 1935, where he became a practicing attorney in Tel Aviv shortly thereafter[6] and where I, his eldest grandson, was born thirty years later.

Personally and professionally, Saul Lande was among the lucky ones. His story as a law student and a legal professional is unique and, to this day, remains inexplicable in parts. It runs against the grain not only of Nazi targeting of Jews in general but, specifically, of their targeting of Jewish jurists—judges, lawyers, law professors and lecturers, and students. Prior to 1933, the practice of law had been a highly coveted occupation for German (and Austrian) Jews. As Ingo Müller notes, "The numerous forms of discrimination faced by Jews . . . had led them to enter the unrestricted professions. . . . This was true above all in the field of law, where the lifting of all restrictions on admission to the bar made the private practice of law one of the most attractive careers for educated Jews."[7] Jews were represented at the bar in significantly higher proportion compared with their percentage of the population. For example, in Berlin, 60 percent of all private practitioners were Jewish.[8]

---

2. For a copy of the certificate, see Hubert Lang, *Zwischen allen Stühlen: Juristen jüdischer Herkunft in Leipzig (1848–1953)* (Leipzig, Germany: Biographiezentrum, 2014), 444.

3. Ibid., 445.

4. A copy of the published work is on file with the author.

5. An article published in the Israeli daily *Ha'Aretz* about Lande's story claims that he did, in fact, travel back to Leipzig to receive the doctoral degree (Ofer Aderet, "A Jew from Palestine Was Awarded Law Degree from Nazi Germany, Exhibition Reveals," *Ha'Aretz*, April 18, 2012, https://www.haaretz.com/jewish/1.5214906). Lande's daughter, Rina Gross, says that to the best of her knowledge he did not return to Germany in 1938 (in an interview with the author).

6. At least one letter sent from Germany to Dr. Lande in "Tel Aviv, Palestine" included a price quote for the publication of his dissertation by another press and ended with the salutation "Heil Hitler!" See Aderet, "Jew From Palestine."

7. Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1991), 59.

8. Ibid., 60.

On April 7, 1933, just over two months after Hitler was appointed chancellor, two new laws were promulgated. The Law on the Admission to the Bar targeted lawyers, decreeing that attorneys of non-Aryan descent could be excluded from the bar. The practical result of that Law was that lawyers of Jewish descent had to reapply for admission to the bar. Only those who had been admitted before August 8, 1914 [*Altanwälte*], who had fought at the front line in the First World War [*Frontkämpfer*],[9] or who had a father or son killed in the war, were exempted and permitted to continue to practice law without seeking readmission.[10]

Within months of the passage of the new law, the number of Jewish lawyers in Germany dropped by over 30 percent, from 4,585 to 3,167.[11] However, the vast majority of Jewish lawyers affected by the law did, in fact, apply for readmission to the bar. For example, 1,761 of 1,835 Jewish lawyers in Berlin opted to do so.[12] Jewish lawyers continued practicing despite the adverse conditions in which they had found themselves. Even as late as 1938, some 10 percent of practicing lawyers in Germany—1,753 out of 17,360—were Jewish.[13] The final move to eliminate the "Jewish lawyer" came in the aftermath of the Anschluss in March 1938, bringing the city of Vienna, where 80 percent of lawyers had been Jewish,[14] into the Nazi fold. On September 27, 1938, Hitler signed a decree that disbarred all remaining Jewish lawyers as of November 30, 1938, allowing for a very small number of former lawyers to assume a newly created position of *Konsulent* [legal advisor] enabling them to handle only Jewish interests and affairs.[15] Unlike lawyers, the legal advisors were not considered "guardians of the law" or, indeed, "lawyer-like actor[s]."[16] Thus, as of the end of November, the legal profession became *entjudet* [free of Jews].

II. HITLER'S MANDARIN INTELLECTUALS

The second law issued on April 7, 1933, the Gesetz zur Wiederherstellung des Berufsbeamtentums [Law for the Restoration of the Professional Civil Service],

9. Douglas G. Morris, "Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism," in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, ed. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn, 2013), 105–35 (at 114–18).
10. Müller, *Hitler's Justice*, 60–61.
11. Morris, "Discrimination," 113.
12. Ibid., 114.
13. Ibid., 129.
14. Müller, *Hitler's Justice*, 60; Morris, "Discrimination," 129.
15. Morris, "Discrimination," 130.
16. Ibid.

decreed that unreliable elements and non-Aryans were to be dismissed from public service. In accordance with that law, Jewish judges had to retire, and Jewish law professors were dismissed from their university positions. Nearly 1,700 faculty members, comprising 15 percent of the universities' teaching staff, lost their jobs.[17] Eighty percent of those fired were Jewish.[18] In the case of faculties of law in German universities, the situation was even worse.[19] Almost a third—120 of 378[20]—of those teaching were subsequently removed from their positions, the vast majority on racial grounds.[21] The vacant positions were filled in short order by "promising untenured faculty colleagues with a 'nationalistic orientation.'"[22] By 1939, 45 percent of German university professors had been appointed during the Third Reich, and by 1945, about two-thirds of university teachers belonged to the Nationalsozialistische Deutsche Arbeiterpartei [National Socialist German Workers' Party (NSDAP)].[23] In law faculties the number was, of course, higher with 60 percent of professors appointed in or since 1933.[24] The once fiercely independent, apolitical, and revered German universities now embraced their new character as political institutions[25] fully

17. Edward Yarnall Hartshorne Jr., *The German Universities and National Socialism* (Cambridge, MA: Harvard University Press, 1937), 99, states that 1,684 were dismissed.

18. Amy R. Sims, "Intellectuals in Crisis: Historians under Hitler," *Virginia Quarterly Review* 54, no. 2 (1978): 246–62 (at 254). Not all universities were similarly affected; some "were virtually untouched by the dismissals." However, rather than reflecting resistance to Nazi personnel policies, such differences merely reflected "the varying willingness of universities during the Weimar Republic to admit Jews, Social Democrats, or left liberals into their faculties. As a rule of thumb, the more open universities were prior to 1933, the more profoundly they were affected by the dismissals after 1933" (Michael Grüttner, "German Universities under the Swastika," in *Universities under Dictatorship*, ed. John Connelly and Michael Grüttner [University Park: Pennsylvania State University Press, 2005], 75–111 [at 91]).

19. Hartshorne notes that "the proportion of Jews in the field of Law was disproportionately large" (*German Universities and National Socialism*, 100).

20. Müller, *Hitler's Justice*, 69. Hartshorne puts the number of those dismissed from the faculties of law at 132 (*German Universities and National Socialism*, 98–99).

21. Hartshorne, *German Universities and National Socialism*, 100. Hartshorne suggests that "the 'Non-Aryans,' who constituted 17.5 per cent of the total staff of the pre-Nazi Law Faculties, make up 78.5 per cent of the dismissals."

22. Müller, *Hitler's Justice*, 69. See also Grüttner, "Universities," 85.

23. Grüttner, "Universities," 93.

24. Müller, *Hitler's Justice*, 235.

25. Gustav Adolf Rein, *Die Idee der politischen Universität* (Hamburg, Germany: Hanseatische Verlagsanstalt, 1933).

coordinated and regulated by the regime.[26] At the same time, the universities lost their position as "the crux of the educational system,"[27] with enrollment dropping down, "as a result of a deliberate policy," from a total of 97,576 students enrolled in 1932 to mere 51,527 in 1938.[28] Furthermore, as the ranks of the professoriate swelled with supporters of National Socialism, so too did the ranks of their students; by 1938, more than 90 percent of them were organized in the National Socialist German Students' League.[29]

III. THE SPIRIT OF NATIONAL SOCIALISM

Once the ranks of university professors had been filled with supporters of the Nazi Party, German academia turned with much zeal and enthusiasm to the project of justifying and legitimating the actions of the regime. Looking at the record of one of the most renowned German universities—Ruprecht Karls University in Heidelberg—Steven Remy finds that the engagement of its professoriate with National Socialism had been "extensive."[30] Professors from all faculties made "tangible contributions" to the "policies of 'racial purification' and territorial expansion . . . the 'Volksgemeinschaft,' and the 'German spirit' in scholarship."[31] In turn, "the willing participation of the academic elite at Heidelberg and other universities was of vital importance to the regime's project of 'racial' purification at home, the concomitant war of expansion, and its imperialist economic and cultural offensives in occupied Europe."[32]

---

26. Sims, "Historians," 254–55, details some additional milestones in the process: "In August 1933, admission to the university became contingent upon four months of compulsory service in the Nazi labor force. . . . Instead of being elected, the rector had to be selected by the regime for his political reliability. And instead of being a symbolic head, he held very real power. In December 1933, professors hired after 1918 had to take a new oath of loyalty to *Volk* and Fatherland. By August 1934, civil servants had to swear loyalty to Adolf Hitler."

27. Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944*, 2nd ed. (London: Oxford University Press, 1944), 399.

28. Neumann, *Behemoth*, 399.

29. Ibid. See also R. G. S. Weber, *The German Student Corps in the Third Reich* (Basingstoke, UK: Palgrave Macmillan, 1986).

30. Steven P. Remy, *The Heidelberg Myth: The Nazification and Denazification of a German University* (Cambridge, MA: Harvard University Press, 2002), 1.

31. Ibid., 239. For a detailed discussion of the contributions of jurists to the development of National Socialist law in various fields of law, see Michael Stolleis, "Law and Lawyers Preparing the Holocaust," *Annual Review of Law and Social Science* 3 (2007): 213–31.

32. Remy, *Heidelberg*, 1.

German legal academics responded with at least as much zeal and enthusiasm in support of the Nazi cause as their colleagues in other disciplines.[33] As Michael Stolleis notes, "An eager rush to publish set in as early as the spring of 1933."[34] Professors of law were "astoundingly productive" in creating and establishing a "'National Socialist legal system.' They saw it as their task to bring about a 'coordination' of the legal profession's thinking parallel to the 'coordination' of legal institutions which had already occurred."[35] Much like members of the German judiciary and bar, law professors threw themselves into the task of providing legitimacy and a cloak of legality to the regime's actions. Indeed, "it was in the writings of . . . scholars that the judges of the Third Reich found guidelines for their verdicts and lethal interpretations."[36]

German legal academia, like German higher education generally, accepted willingly and enthusiastically the notion that scholarship was impossible without a foundation of values, which were, of course, those of National Socialism. As Carl Schmitt declared: "The whole of German law today . . . must be governed solely and exclusively by the spirit of National Socialism. . . . Every interpretation must be an interpretation according to National Socialism."[37] Similarly, "All vague concepts, all so-called omnibus clauses, are to be made absolute and unconditional in accordance with National Socialism."[38] The tradition of "neutral research" was displaced by the notion of research as "the institutional reality of the spiritual realm,"[39] leading to the ominous conclusion

33. Arthur Kaufmann, "National Socialism and German Jurisprudence from 1933 to 1945," *Cardozo Law Review* 9 (1988): 1629–49 (at 1630). Kaufmann notes that "the majority of legal philosophers not only did not oppose National Socialism, they firmly and unequivocally supported almost all of the important goals of the new 'völkische bewegung' (popular movement), including their racial policies" (ibid.). Müller's assessment of the culpability of law professors during this era is similarly grim: "An essential role in the decline of law during the Third Reich was played by law professors at German universities. They provided a philosophical cloak for the Nazis' arbitrary acts and crimes. . . . There was virtually no outrage perpetrated by the Nazis which was not praised during the regime as 'supremely just' and defended after the war by the same scholars, with equally dubious arguments, as 'justifiable' or even 'advisable' from a legal point of view" (*Hitler's Justice*, 68).

34. Michael Stolleis, *A History of Public Law in Germany, 1914–1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 364.

35. Müller, *Hitler's Justice*, 70.

36. Ibid., 68.

37. Kaufmann, "Jurisprudence," 1644 (quoting Carl Schmitt).

38. Ibid., 1645 (quoting Carl Schmitt).

39. Max Weinreich, *Hitler's Professors: The Part of Scholarship in Germany's Crimes against the Jewish People* (London: Yiddish Scientific Institute [YIVO], 1946; repr., foreword by Martin Gilbert, New Haven, CT: Yale University Press, 1999), 37. See also Remy, *Heidelberg*, 6–7.

that "[since] the national goal is to be considered without further ceremony a motive for excluding guilt . . . [e]xterminating without remainder the inner enemy is doubtlessly part of restituting German honor."[40] The guiding theme of academic research became the "German spirit," which "encompassed streams of völkisch nationalism, anti-Semitism, and biological and cultural racism and entailed an antipositivist conception of scholarship that placed all research and teaching in the service of the 'people's community,' defined in racist terms."[41] Hans Schemm, the chief of the National Socialist Teachers' League—whose membership stood at 220,000 by late 1933[42]—captured the shift when he stated that, "From now on, it is not up to you to decide the truth of anything, but to determine whether it conforms to the meaning of the National Socialist Revolution."[43]

That same German spirit, and the meaning of the National Socialist revolution, expressed through and reflected in German "common law," entailed the exclusion of "non-German" elements from all legal spheres.[44] In fact, many legal scholars had been hard at work preparing Hitler's path to power by setting the stage for the dismantling of the Weimar Republic and its constitution. The "Mandarin intellectuals," as Fritz Ringer referred to university professors,[45] were mostly conservative nationalists and antirepublican long before 1932.[46] They ferociously attacked liberalism, individualism (including any notion of individual basic rights),[47] and parliamentary democracy as incorporated and reflected in the "system" of the Weimar constitution. The "demise in Germany of liberal law, the transformation of the German legal system, and the creation of a new anti-liberal Nazi legal order,"[48] had all, in turn, been entangled "like vines" with the elimination of Jewish lawyers, who, in addition to being

40. Weinreich, *Professors*, 37. On the use of "irrational language"—such as honor, loyalty, blood and soil, heroic—by legal scholars supporting the regime, see Kaufmann, "Jurisprudence," 1638–41.

41. Remy, *Heidelberg*, 6.

42. Claudia Koonz, *The Nazi Conscience* (Cambridge, MA: Belknap Press of Harvard University Press, 2003), 133.

43. Ibid., 136–37.

44. Remy, *Heidelberg*, 43.

45. Fritz K. Ringer, *The Decline of the German Mandarins: The German Academic Community, 1890–1933* (Hanover, NH: University Press of New England, 1969), 5–6.

46. Remy, *Heidelberg*, 7–10.

47. Kaufmann, "Jurisprudence," 1635.

48. Morris, "Discrimination," 107.

considered the ultimate *artfremde* [foreign "other"], were mostly liberals.[49] Thus, as "the ground at Heidelberg and other universities was well prepared for the Nazi seizure of power," National Socialism's "intellectual preconditions were being formed outside National Socialism itself."[50]

"All Honourable Men"[51]

Arthur Kaufmann notes that "among legal philosophers—who actually should have been the main custodians of the right to oppose—hardly any opposition was voiced."[52] In fact, "The majority of German legal philosophers . . . supported the National Socialists in very different ways."[53] Arthur Kaufmann and Mathias Reimann focus on the role played by several leading German scholars, including Theodor Maunz, Ernst Forsthoff and Karl Larenz.[54] I will briefly follow their examples before turning in the next section to focus on the greatest legal asset at the disposal of the Nazis, Carl Schmitt.

"Every German lawyer," writes Reimann, "knows [Theodor] Maunz as the coauthor of the most authoritative commentary on the West German constitution and for writing one of the leading treatises on constitutional law and the system of government."[55] Indeed, Maunz has been so highly regarded in postwar Germany that he became known as "der Kronjurist des Grundgesetzes" [the crown jurist of the Basic Law], a reference to his status as the leading expert on the West German constitution.[56] For twenty years, between 1932 and 1952, Maunz taught (and since 1937, was a full Professor) at the University of Freiburg before moving to the Ludwig Maximilian University in Munich.

---

49. In a 1936 conference on "Jewry in Jurisprudence" (see notes 162–66 and the accompanying text in this chapter), one of Germany's leading professors of constitutional and administrative law, Theodor Maunz elaborated on the "fatal predilection of Jewish theorists of administrative law for the liberal doctrine of the Rechtsstaat." See Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998), 187.

50. Remy, *Heidelberg*, 11.

51. William Shakespeare, *The Tragedy of Julius Caesar*, 3.2.83.

52. Kaufmann, "Jurisprudence," 1634.

53. Ibid., 1635.

54. Mathias Reimann, "National Socialist Jurisprudence and Academic Continuity: A Comment on Professor Kaufmann's Article," *Cardozo Law Review* 9 (1988): 1651–62 (at 1652–55).

55. Ibid., 1653.

56. Gerhard Mauz, "'Ich bin nicht nur wütend,'" *Der Spiegel*, October 18, 1993, http://www.spiegel.de/spiegel/print/d-13680349.html.

He later served as minister of education for Bavaria. However, that "kind and reclusive" man[57] had also been "one of the most ardent supporters of National Socialism."[58] Stolleis's assessment of Maunz is a bit more benign: "Maunz was a *Vernunftrepublikaner* [republican by reason] and supporter of the *Rechtsstaat* [rule of law] when that was still part of the traditional code of conduct at the end of the Weimar Republic; he was a National Socialist as long as the others were, and a little bit more so and for a little longer; then he was once again a legal positivist with a touch of natural law. It all depended on the time and circumstances, like a chameleon that has the ability to adjust its color and temperature to the environment."[59]

Yet there is no disputing that Maunz fully immersed himself in, and supported, National Socialism. In his 1934 work on the *Neue Grundlagen des Verwaltungsrechts* [New Foundations of Administrative Law], Maunz explained: "The central legal structure, behind which all other legal structures have to follow, is the political Führer. . . . [A]ny judicial activity in the field of administrative law is impossible. It follows that the administration of justice can never hinder the political decisions of the Führer."[60] Following that logic, Maunz pronounced arrests by the Gestapo to constitute "sovereign acts" that fall outside any possible judicial scrutiny and review.[61] After all, he claimed, the source of legality for any police action was none other than the will of the Führer. Maunz argued that notions such as individual rights and separation of powers belonged in the liberal state and decried them as guarantors of the bourgeois concept of freedom and as such incompatible with the National Socialist state where the "powers are united in the person of the Führer."[62] Similarly to the expropriation of a person's liberty, Maunz expounded on a "National Socialist right of expropriation" of property that hinged on the national community and the proclaimed will of the Führer.[63] Maunz's legalistic contortions in the service of National Socialism can also be seen in his treatment of the principle of equality. According to Maunz, German law did contain this principle, but

57. Stolleis, *Swastika*, 185, describes the obituaries for Maunz upon his death.

58. Reimann, "Continuity," 1652.

59. Stolleis, *Swastika*, 189.

60. Theodor Maunz, *Neue Grundlagen des Verwaltungsrechts*, Der Deutsche Staat der Gegenwart 9 (Hamburg, Germany: Hanseatische Verlagsanstalt, 1934), 48, 55. On Maunz's contribution to the creation of a National Socialist administrative law, see Stolleis, *History*, 382–83.

61. Stolleis, *Swastika*, 187.

62. Theodor Maunz, *Verwaltung* (Hamburg, Germany: Hanseatische Verlagsanstalt), 42.

63. Kaufmann, "Jurisprudence," 1635.

it was based on race rather than relating to all human beings as such. Thus, the foreign other could be excluded from, for example, local swimming pools, without such an exclusion violating the law; indeed, such exclusion would be considered as upholding the law.[64] Last, but certainly not least, in the infamous 1936 conference on "Jewry in Jurisprudence,"[65] Maunz emphasized the "fatal predilection of Jewish theorists of administrative law for the liberal doctrine of the *Rechtsstaat*."[66]

Ernst Forsthoff is considered Carl Schmitt's "model pupil."[67] He was another member of the professoriate who had become an ardent supporter of National Socialism in the early 1930s. Like many others he benefited from the dismissal of Jews and unreliable professors from German universities. Beginning his teaching career in Frankfurt in 1933, he succeeded to the chair previously held by Herman Heller, before moving to Hamburg, Königsberg, Vienna, and Heidelberg between 1935 and 1945. In his 1933, forty-eight-page essay, "Der Totale Staat" [The Total State], Forsthoff developed the argument that a "total state" was superior to a liberal democracy. Indeed, he declared that liberalism was finished.[68] The Weimar Republic—an "unprecedented fourteen-year-long path of suffering"[69]—was to be replaced by a national state in which every individual would be placed under complete obligation to the nation.[70] Individuals were to alienate their autonomy and subordinate to race, the Volk, and the state,[71] and be prepared "to give oneself up to society."[72] It was the decision-making realm of the state that served as the ultimate source of public order.[73] This

64. Ibid., 1637.

65. See notes 165–69 and the accompanying text in this chapter.

66. Stolleis, *Swastika*, 187.

67. Florian Meinel, "Ernst Forsthoff and the Intellectual History of German Administrative Law," *German Law Journal* 8 (2007): 785–99 (at 787) (quoting Peer Zumbansen).

68. Ernst Forsthoff, *Der Totale Staat* (Hamburg, Germany: Hanseatische Verlagsanstalt, 1933), 7.

69. Forsthoff as quoted in Kaufmann, "Jurisprudence," 1639.

70. Forsthoff, *Totale Staat*, 42. According to Stolleis, "What Forsthoff envisaged was not totalitarian despotism, but the authoritarian state of the 'conservative revolution' that would reconcile conservatism and modernity, a commitment to values and efficiency. Neither parties nor associations, neither parliament nor public opinion should be allowed to impair the goal of an objective, task-oriented administration" (*History*, 374).

71. Peter C. Caldwell, "Ernst Forsthoff and the Legacy of Radical Conservative State Theory in the Federal Republic of Germany," *History of Political Thought* 15, no. 4 (1994): 615–41 (at 616).

72. Caldwell, "Forsthoff," 619.

73. Ibid., 618.

"kind, learned, and cultivated human being"[74]—who just happened to be a member of the Nazi Party, the SA, and the Nationalsozialistischer Deutscher Dozentenbund [National Socialist German University Instructors' League]—then embraced National Socialist authoritarianism and expressed openly his antisemitic views, including the statement that the "essentially different Jew" had become an enemy that had to be rendered harmless.[75] In similar vein, his *Deutsche Geschichte in Dokumenten seit 1918* [German history in documents since 1918] "could not have been a stronger propaganda tract had it been written by Joseph Goebbels himself."[76] In that volume, Forsthoff "justifie[d] every major public policy of the regime up to 1938."[77] Unlike Maunz's perverse insistence that the principle of equality still prevailed under National Socialism, Forsthoff openly challenged the "horrendous" notions of egalitarianism and egalitarian democracy.[78] He disagreed with Otto Koellreutter that concentration camps were incompatible with the National Socialist conception of the Rechtsstaat[79] and argued that "individualistic liberalism must no longer be allowed to enjoy the privilege of publicity in Germany."[80]

Karl Larenz is "a name every first-year German law student will know," wrote Mathias Reimann in 1988.[81] He was a professor of civil law, appointed in 1933 at the University of Kiel to the chair previously held by Gerhart Husserl, who had been dismissed from his position for being a Jew. Larenz became a leading member of what was known as the Kiel school, "an attempt to give

74. Kaufmann, "Jurisprudence," 1642.

75. Peter C. Caldwell, "Ernst Forsthoff in Frankfurt: Political Mobilization and the Abandonment of Scholarly Responsibility," in *"Politisierung der Wissenschaft": Jüdische Wissenschaftler und ihre Gegner an der Universität Frankfurt am Main vor und nach 1933*, ed. Moritz Epple et al., Schriftenreihe des Frankfurter Universitätsarchivs 5 (Göttingen, Germany: Wallstein, 2016), 249–84 (at 269). Unlike several of his colleagues, first and foremost Carl Schmitt, Forsthoff was willing to acknowledge, at least rhetorically, the possibility of "the Jew" ceasing to be the "enemy." This could happen, he argues, "only if the Jews give up any attempt to participate in the spiritual, intellectual and political existence of the German people, and withdraw completely into their Jewishness."

76. Remy, *Heidelberg*, 191.

77. Ibid., 88.

78. Kaufmann, "Jurisprudence," 1637, citing Forsthoff, *Totale Staat*, 24.

79. Stolleis, *History*, 355.

80. Kaufmann, "Jurisprudence," 1634, citing Forsthoff, *Totale Staat*, 33.

81. Reimann, "Continuity," 1653. Reimann ("Continuity," 1654) further notes that, "Larenz authored the leading treatises on core subjects in private law. Here, his authority equals the highest courts' [*sic*]. Moreover, his work on legal methodology is generally regarded as second to none."

National Socialism . . . some kind of intellectual form, especially through the application of a modernized Hegelian legal philosophy."[82] Ensconced in the "shock troop university" that was Kiel,[83] Larenz proclaimed that only *Volksgenossen* [national comrades] were entitled to legal responsibility (a notion closely linked to the idea of legal entity) and, in fact, that even among them, not everybody was equally so entitled.[84] Like his other colleagues mentioned previously, Larenz based the legality and validity of any decision and law exclusively on the Führer's will. Hence, "a law based on his will is not subject to judicial review."[85]

Unlike his younger colleagues, Maunz, Forsthoff, and Larenz, who were appointed into positions vacated by the dismissal of Jewish colleagues, Otto Koellreutter became a full Professor at the University of Halle in 1920 before moving to Jena a year later and to Munich (which he described as "the capital of the [Nazi] movement") in 1933.[86] He became the Dean of the law faculty in the same year, making the university an institution "clearly dominated by National Socialists."[87] Also unlike many of his colleagues, he cast his lot with National Socialism before the fateful spring of 1933.[88] In 1932, Koellreutter was the "first state law teacher to sign an electoral proclamation in support of the NSDAP."[89] Together with his great academic rival, Carl Schmitt,[90] Koellreutter was "the most prominent among the renowned scholars who professed themselves followers of National Socialism."[91] Koellreutter, who in earlier writings extolled the eternal and timeless values of the Rechtsstaat, now was at pains to prove his allegiance to National Socialism by claiming the desirability and superiority of the "national *Rechtsstaat*."[92] In his 1933 brochure, "Vom Sinn und Wesen der Nationalen Revolution" [On the meaning and essence of the national revolution],[93] in arguments similar

82. Stolleis, *History*, 291–92.
83. Ibid., 291.
84. Kaufmann, "Jurisprudence," 1636.
85. Ibid., 1640.
86. Stolleis, *History*, 289.
87. Ibid., 300.
88. Caldwell, "Forsthoff," 623.
89. Stolleis, *History*, 163.
90. On the dispute between Schmitt and Koellreutter in which each charged the other party with liberal tendencies and their struggle over the fate of the Association of Teachers of State Law, see Stolleis, *History*, 327–31, 354–55.
91. Stolleis, *Swastika*, 97.
92. Stolleis, *History*, 354.
93. Otto Koellreutter, *Vom Sinn und Wesen der Nationalen Revolution*, Recht und Staat in Geschichte und Gegenwart 101 (Tübingen, Germany: J. C. B. Mohr, 1933).

to those we have already seen, Koellreutter pronounced liberalism to be a failure, rejected any notion of individual rights in favor of obligations of individuals to the community and the nation, and, somewhat ironically, followed his great foe Carl Schmitt's friend-foe dichotomy. With Koellreutter, who was awarded several honors and distinctions for his fighting in World War I, including the Iron Cross First Class, much of his support of Nazism was clearly linked to his strong opposition to the Weimar Republic and his perception of the need for a strong national power. That led him to declare in 1932 that while the Nazi Party was constitutional, the Communist Party was not, despite the fact that both sought to dismantle the Weimar Republic and constitution.[94]

IV. KRONJURIST DES DRITTEN REICHES

No single member of the Mandarin legal elite had a more pernicious impact on the collapse of Weimar and the rise of the Nazi state than Carl Schmitt. None made greater contributions to the weakening and eventual dismantling of the Weimar Republic and its constitution. None rose as fully in support of the racial policies of the Nazi regime, while also theorizing about, legalizing, and legitimizing the phenomenon of the Führer. Dubbed the "crown jurist of the Third Reich,"[95] Schmitt, the first and most prominent constitutional theorist and political thinker to join the cause of National Socialism and lend his active support to the Nazis,[96] "developed for Hitler the legal-philosophical outlines for the constitution of the Third Reich and wrote that the pivot was Hitler's status as both head of state and party leader."[97]

Attacking Weimar

According to its detractors among conservative legal theorists and political thinkers, the liberal Weimar system with its focus on individual rights and parliamentarism and its positivist underpinnings was inherently deficient. Against

94. Otto Koellreutter, *Parteien und Verfassung im heutigen Deutschland* (Leipzig, Germany: Hirschfeld, 1932).

95. Franz Neumann refers to Schmitt as "the most intelligent and reliable of all National Socialist constitutional lawyers" (*Behemoth*, 49). Similarly, Schmitt was recognized by the regime as "the most renowned national constitutionalist in Germany." See Yvonne Sherratt, *Hitler's Philosophers* (New Haven, CT: Yale University Press, 2013), 99.

96. Stolleis, *Swastika*, 92, 97.

97. Sherratt, *Philosophers*, 100.

Weimar's built-in culture of discussion and debate, they presented the capacity to decide.[98] Against Weimar's "effeminate passivity"[99] they posited the "masculine cult of action and will."[100] Weimar's focus on legislators and judges was cast aside in favor of the sovereign dictator. Its liberal insistence on individual rights was to be replaced by the *Volksgemeinschaft* [national community], its pluralism and "emotional pantheism"[101] substituted by coordination[102] and *Artgleichheit* [racial homogeneity]. Its "cosmic tolerance," which meant that "there [was] no longer anything that one could love and honestly hate"[103] gave way to the dichotomy between friend and foe/enemy.[104] Finally, liberalism's misguided (or even deceitful) attachment to general norms that applied at all times and in all situations was challenged by the notion of the exception.

It was this last concept— the *Ausnahmezustand* [exception]—that served as Carl Schmitt's main weapon in his attack on Weimar's constitutionalism and liberalism.[105] According to Schmitt, the existence of exceptional situations refuted the formal face of legal liberalism, which argued that preestablished general norms covered and applied to all possible situations.[106] The need to decide the exceptional, concrete situation emphasized the central role of political

98. Neumann, *Behemoth*, 45. Neumann discusses Carl Schmitt's decisionism, that is, "the demand for action instead of deliberation, for decision instead of evaluation."

99. Carl Schmitt, *Political Romanticism*, trans. Guy Oakes (Cambridge, MA: MIT Press, 1986), 128.

100. Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (Cambridge: Cambridge University Press, 1984), 118. As he shows: "A masculine cult of action and will permeates Schmitt's protest against the rationalization of political conflict and is meant to distinguish this cult from nineteenth century German romanticism, which is viewed as effeminate and hence passive and apolitical."

101. Schmitt, *Romanticism*, 128.

102. The Nazis "sought to control virtually every aspect of life in Germany through the 'coordination' of public and private life with the regime's ideological objectives. Universities were to be no exception." See Remy, *Heidelberg*, 4.

103. Schmitt, *Romanticism*, 128.

104. Carl Schmitt, *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976; repr. and expanded, Chicago: University of Chicago Press, 2007), 26. Schmitt argues that "the specific political distinction to which political actions and motives can be reduced is that between friend and enemy."

105. This section of the paper draws heavily from Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), 162–68.

106. Schmitt's theory of the exception, as well as his general jurisprudential approach, was a rejection of the neo-Kantian, formalist, and positivist jurisprudence of Hans Kelsen. See, for example, David Dyzenhaus, "'Now the Machine Runs Itself': Carl Schmitt on Hobbes

decision-makers who had to decide how to deal with the exception on a case-by-case basis. The exception required concrete decisions that were not, and could not be, constrained or guided by any sort of a priori rules.

The first of the four chapters on the concept of sovereignty, which together comprise Schmitt's 1922 book, *Political Theology*, revolves around the concept of "the exception" and its relationship to the idea of sovereignty. Schmitt makes clear the link between the two concepts in the very first sentence of the book, where he declares that the "sovereign is he who decides on the exception."[107] He goes on to emphasize the point that "it is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty."[108]

Schmitt considers the exception to be the purest expression and reflection of the political.[109] "The specific political distinction to which political actions and motives can be reduced," writes Schmitt, "is that between friend and enemy."[110] It is the ever-present possibility of combat that gives the friend-foe dichotomy its real meaning. "The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity."[111] Characterized as a case of "extreme peril, a danger to the existence of the state, or the like,"[112] the clearest instance of a state of exception is an armed conflict, whether of an international or internal nature. War constitutes the core of the exception and, as such, paints the exception with the colors of the political. It is thus that the inherent link

---

and Kelsen," *Cardozo Law Review* 16 (1994): 1–19 (at 10–14). See also Volker Neumann, "Carl Schmitt: Introduction," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper, Philosophy, Social Theory, and the Rule of Law 8 (Berkeley: University of California Press, 2000), 280–89 (at 283). Neumann argues that "opposition, even hostility to Hans Kelsen is a key to all of Schmitt's works." This theory also rejects Kelsen's belief that a legal norm could be devised so as to regulate all different aspects of reality and his concomitant refusal to acknowledge the existence of states of exception that could not be regulated by a priori established legal norms.

107. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: MIT Press, 1985), 5.

108. Ibid., 6.

109. William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, MA: MIT Press, 1994), 67.

110. Schmitt, *Concept of the Political*, 26. On Schmitt's definition of politics as the only clear example of a politics-as-power definition, see Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 125.

111. Schmitt, *Concept of the Political*, 33.

112. Schmitt, *Political Theology*, 6.

between the political and the exception is fully established, for "the exceptional case has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy. From this most extreme possibility human life derives its specifically political tension."[113] Since every sphere of human conduct could potentially rise to the level of the political—"if it is sufficiently strong to group human beings effectively according to friend and enemy"[114]—the exception inevitably permeates all aspects of human existence, and deciding on it becomes the single most important moment in every respect of human activity.[115]

Important as it is, Schmitt does not define this central term. In fact, he argues that no such definition is at all possible. He contends that "the exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like."[116] However, the exception "cannot be circumscribed factually and made to conform to a preformed law."[117] While existential crises facing the state may be said to constitute the core of the exception, the external limits and boundaries of its penumbra are unclear, and cannot be made clear in advance. It is this fundamental characteristic of the exception which negates any belief in the possibility of constructing, in advance, a set of general, objective norms that will cover all future situations, without any need for further subjective discretion and decision-making, and which are independent of a mechanistic, technical application of the general norms to concrete scenarios. In exceptional circumstances, when the normal state of affairs is interrupted, regular legal norms are no longer applicable and cannot fulfill their ordinary regulatory function. "For a legal order to make sense, a normal situation must exist."[118] General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Crises undermine this factual basis and thus pull the rug out from under the feet of ordinary norms. Law is not omnipresent and omnipotent; general a priori rules cannot regulate the exception. "There

113. Schmitt, *Concept of the Political*, 35.
114. Ibid., 37.
115. George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (New York: Greenwood Press, 1989), 73–75.
116. Schmitt, *Political Theology*, 6.
117. Ibid.
118. Ibid.

exists no norm that is applicable to chaos."[119] The exception resides in those areas where the norm breaks down and loses its "immanent validity."[120] This, together with the idea that the exception "cannot be circumscribed factually and made to conform to a preformed law,"[121] makes it *normless*.

In *Political Theology,* Schmitt endorses a revolutionary model of sovereign dictatorship.[122] He contends that the exception is characterized by "principally unlimited authority, which means the suspension of the entire existing order."[123] Even more significant is the sovereign dictator's power to actively change the existing legal order and transform it, in whole or in part, into something else. It is not only that the exception confirms the rule and that the rule's very existence "derives only from the exception"[124] but rather that the exception gobbles up the normal case and becomes, in and of itself, the ordinary, general rule. There is no place to continue talking about rule and exception. "The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception."[125] Inasmuch as crises represent the sphere of the political, and given the primacy of politics over all other spheres of human endeavor—it is the exception that defines the norm, not vice versa. The exception is primary to the norm and defines and informs that norm.[126] "The rule proves nothing; the exception proves everything."[127]

---

119. Ibid.

120. Ibid.

121. Ibid.

122. John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), 133–41. In contrast, see Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (Cardiff, UK: University of Wales Press, 1998), 63–70. Cristi argues that in *The Dictatorship,* Schmitt has already promoted the idea of the sovereign dictatorship over the alternative commissarial model as a means of reinvigorating "the monarchical principle" and countering the use by Marxism of the sovereign dictatorship model.

123. Schmitt, *Political Theology,* 12.

124. Ibid., 15.

125. Ibid.

126. Carlo Galli, "Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning," *Cardozo Law Review* 21 (2000): 1597–617 (at 1616): "From a liberal standpoint exception is exception, not the rule. In other words, it is obvious that in any liberal theory contingency can't ever take the dramatic aspect it takes in Schmitt's thought. . . . Liberals can't agree that contingency is not simply concreteness, nor relativism, but the original and permanent tragedy of politics."

127. Schmitt, *Political Theology,* 15. Schmitt quotes Søren Kierkegaard when the latter states: "The exception explains the general and itself. And if one wants to study the general

Schmitt's ultimate goal is not merely subjecting the normal to the exception. Rather, it is the complete destruction of the normal case and its replacement by the *exceptionless* exception. In describing the exception, Schmitt states:

> The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. . . . If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it.[128]

The sovereign dictator enjoys unlimited powers.[129] Such unlimited powers pertain both to his unfettered discretion as to whether an exception, in fact, exists, as well as to what measures ought to be taken in order to counter the concrete threat. The only logical outcome of Schmitt's collapsing together the power to decide the existence of the exception and the breadth of counter-emergency powers to be used in order to bring the exception to a conclusion, and depositing them both in the hands of one person, is that the dictator's unlimited powers are never turned off. The dictator is the person who needs to decide that the normal state of affairs has been replaced by an extreme case and then decide what powers to use to counter the particular danger. However, the exception is a possibility that may never be discounted or disregarded.[130] It may occur at any given time, without prior warning, and create a "danger to the

---

correctly, one only needs to look around for a true exception. It reveals everything more clearly than does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on the other hand, thinks the general with intense passion." For a slightly different translation, see Søren Kierkegaard, *"Repetition" and "Philosophical Crumbs,"* trans. M. G. Piety, *Oxford World's Classics* (Oxford: Oxford University Press, 2009), 78. Schmitt has modified and adapted Kierkegaard's original formulation in several significant respects.

128. Schmitt, *Political Theology*, 6–7.

129. Ibid., 12: "Not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order."

130. Galli refers to Schmitt's "dramatic theory of modern politics as permanent crisis" ("Antiliberalism," 1615).

existence of the state."[131] What ought to count is not the actual occurrence of an exception but rather the *possibility* of its taking place, and in a world governed by the exception, such a possibility is all the more inevitable.[132] The existence of an exception or a possibility thereof means that the sovereign must always be vigilant and, in fact, paranoid.[133] The result is that the sovereign is not only the one who decides on the exception but also the one who definitely decides whether the normal situation actually exists.[134]

It is only the sovereign dictator who can authoritatively distinguish the exception from the normal and decide to take state action. At the same time, Schmitt considers sovereignty and the powers attached to it as indivisible.[135] Thus, one cannot say that only part of the sovereign's power is operational at any given moment. Subject to the personal decision of the sovereign dictator, the sovereign's unlimited powers may be put to use at any time. No external, objective limitations may be imposed on the exercise of these powers. Hence, should the sovereign dictator so desire, his unlimited powers—originally designed to apply to the exceptional case—may come to control the norm, indeed, *be* the norm.

Schmitt argues that the political will only disappear in "a world in which the *possibility* of war is utterly eliminated, a completely pacified globe."[136] Only such a world—in which the distinction between friend and foe is obsolete—can be a world without politics. "The phenomenon of the political can be understood only in the context of the ever present *possibility* of the friend-and-enemy grouping."[137] In a world governed by the exceptionless exception, however, there is an ongoing possibility of external conflicts among collectivities of people, as well as internal conflicts within any given collectivity, which may create the need to distinguish between friend and foe, thus invoking a political decision. With this exceptionless exception worldview, where the political is ever present and ever relevant and where ordinary day-to-day questions are very much interested in,

131. Schmitt, *Political Theology*, 6.

132. Of course, a world governed by a permanent exception is a fit description of Schmitt's assessment of his own environment when writing *Political Theology* in 1922.

133. Anthony Carty, "Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt," *Cardozo Law Review* 16 (1995): 1235–92 (at 1237). As Carty points out: "For Schmitt[,] paranoia is all that stands between [the German] people and the specter of extinction."

134. Schmitt, *Political Theology*, 13.

135. Ibid., 8.

136. Schmitt, *Concept of the Political*, 35 (emphasis added).

137. Ibid. (emphasis added).

and concerned with, the concept of sovereignty,[138] Hobbes's twentieth-century self-proclaimed heir[139] throws us back into the Hobbesian state of nature.

In fact, Schmitt goes much farther than Hobbes. Hobbes's absolutist model of political and legal authority contains some external limit on the powers exercised by the sovereign—namely, those derived from the supreme principle of self-preservation, which also means individual self-preservation. Hobbes's theory leaves room for the individual in the overall framework, inter alia, by acknowledging her right to resist the dictates of the sovereign when the latter attempts to take her life.[140] This right of resistance presents an outer limit on the Leviathan's otherwise sweeping power and authority. However, even this minimal limitation is removed by Schmitt, as he considers this aspect of Hobbes's theory to undermine the effectiveness, and indeed the viability, of the Englishman's position.

Schmitt leaves no defense mechanisms against the "strong total state."[141] After all, "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind."[142] However, to argue that an order that is characterized by an "unlimited authority" of the sovereign dictator is an "order in the juristic sense" means nothing. Furthermore, since the normal case and the exception collapse into one exceptionless exception, this disorderly order also becomes the "ordinary kind" of order in the Schmittian state. In that Schmittian state, nothing can withstand the sovereign dictator. There is no immovable wall that can withstand his unstoppable force. The ever-existing exception

138. Contrast this with Schmitt's critique of liberal jurisprudence as one "concerned with ordinary day-to-day questions [and having] practically no interest in the concept of sovereignty." See Schmitt, *Political Theology*, 12.

139. Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab and Erna Hilfstein (Westport, CT: Greenwood, 1996; repr., Chicago: University of Chicago Press, 2008). See also David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), 85–97, and McCormick, *Technology*, 249–58.

140. Leo Strauss, "Notes on Carl Schmitt, *The Concept of the Political*," trans. J. Harvey Lomax, in *The Concept of the Political*, by Carl Schmitt, ed. George Schwab, exp. ed. (Chicago: University of Chicago Press, 2007), 97–122 (at 106–7).

141. Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997), 112–14.

142. Schmitt, *Political Theology*, 12.

feeds into the "decisionistic and personalistic element in the concept of sovereignty."[143] Such a state of affairs offers as much predictability as the sovereign's whim. If liberalism's fault inheres in the normative and utopian nature of its structures, Schmitt's fault lies with the apologetic overtones of his proposals. Against liberalism's rigidity, Schmitt puts forward an all too flexible alternative. Whatever the sovereign decides is legitimate. There is no substantive content against which legitimacy of such actions can be measured—not even Hobbes's minimalist principle of self-preservation.

Despite Schmitt's attacks against the content-neutrality of liberalism and positivism, his theory, in the last account, is nihilistic.[144] In its purest form, a decision emerges out of nothing; that is, it does not presuppose any given set of norms, and it does not owe its validity or its legitimacy to any preexisting normative structure. No such structure, therefore, can attempt to limit the decision's scope in any meaningful way.[145] As William Scheuerman pointedly notes: "A rigorous decisionist legal theory reduces law to an altogether arbitrary, and potentially inconsistent, series of power decisions, and thus proves unable to secure even a modicum of legal determinacy. It represents a theoretical recipe for a legal system characterized by a kind of permanent revolutionary dictatorship. . . . Decisionism, at best, simply reproduces the ills of liberal legalism, and, at worst, makes a virtue out of liberalism's most telling jurisprudential vice."[146]

The German Constitutional State of Adolf Hitler

No one represented more fully Schmitt's "decisionistic and personalistic element in the concept of sovereignty" than Adolf Hitler. Hitler's rise to power allowed Schmitt to see his ideas put into action. His general musings about political and legal theory now turned into concrete actions in support of the National Socialist cause by formulating the case for the Führer state and for purifying the ranks of the legal profession of "alien" elements—first and foremost Jews—and

143. Ibid., 48.

144. Carty, "Interwar," 1270–71. Carty argues that Schmitt, like Kelsen, demonstrates "a flight from the complexity of political compromise into a nihilistic one-dimensionality which leaves completely open who is deciding what for whom."

145. McCormick, *Technology*, 153. McCormick notes that "if the constitution's primary purpose is to establish an institution, such as a presidency, to exclusively embody the preconstitutional sovereign will in a time of crisis, then the constitution is inviting its own disposability."

146. William E. Scheuerman, "After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933–1936," *Cardozo Law Review* 19 (1998): 1743–69 (at 1755–56).

ensuring its ethnic, racial, cultural, spiritual, and ideological homogeneity.[147] It is here that Schmitt's legal and political model became unmistakably colored in shades of black and red.

The Third Reich epitomized the departure from liberalism and its substitution by *Gleichschaltung*, that is, achieving coordination and uniformity through policies and measures of repressing individual rights and freedoms. It also epitomized the departure from what Schmitt derisively called the *bürgerlicher Rechtsstaat* [state based on the liberal rule of law] to the Führer state. Under the Reich, "the state and the law acquire an identical meaning for the Volk."[148] Thus, not only was the rule *of* law replaced by rule *by* law,[149] but to the extent that all law was to be understood in the light of German spirit and value, it was also replaced by the "rule of ethos."[150] The Führer personified the purest form of decisionism replacing all useless forms of constitutional and legal discussion. Inasmuch as "discussion is liberalism,"[151] ridding Germany of the former, meant the destruction of the latter. On the whole, the "führer state," declared Schmitt, was an "exemplary constitutional state."[152] In that "constitutional state of Adolf Hitler,"[153] he proclaimed, "we do not determine what National Socialism is according to a preexisting concept of the constitutional state, but rather the reverse; the constitutional state [is determined] according to National Socialism."[154] "German blood and German honor have become the basic principles of German law, while the state has become an expression of racial strength and unity."[155]

Schmitt harnessed his talents and immense prestige in the service of National Socialism. His strong antisemitic views certainly did not prove an obstacle in that regard. Thus, for example, on May 10, 1933, when Nazi students burned books by Jewish authors, Schmitt published an article in which he celebrated the burning out of the "un-German spirit" and "anti-German filth," mocked anyone who appreciated Jewish authors as "unmanly," and criticized the students for targeting too few authors' works for the pyre. According to

147. Ibid., 1756–64.

148. Müller, *Hitler's Justice*, 70–71.

149. On this distinction, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 17–19.

150. Kaufmann, "Jurisprudence," 1637.

151. Ibid., 1646 (quoting Schmitt).

152. Ibid., 1639.

153. Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?," *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935): 189–201 (at 199).

154. Müller, *Hitler's Justice*, 71 (translating another source by Schmitt).

155. Sherratt, *Philosophers*, 101.

Schmitt, writings by non-Jewish authors who had been influenced by Jewish ideas should have also been destroyed.[156]

In 1934, following the Night of the Long Knives, Schmitt publicly proclaimed that the bloody purge had been the "highest form of administrative law"[157] and as such legitimate and legal. Even more odious was his support and legitimation of the Nuremberg Race Laws of September 15, 1935, that were to become the foundational basis for the racial policies of the Nazi regime. Two weeks after the adoption of the laws, Schmitt published an article under the title "Verfassung der Freiheit" [Constitution of Freedom] in the leading *Deutsche Juristen-Zeitung*, of which he himself was the editor.[158] In the article, Schmitt referred to the racial laws as the first German constitution of freedom for centuries. He emphasized that the laws were not merely to be numbered among other equally important pieces of legislation. Rather, they would "determine what we may call morality and public order, decency and good practice. They are the constitution of freedom, the core of our German law today. Everything that we German lawyers do gains its meaning and honor from them."[159]

For his fervent support of the Nazi Party, Schmitt was rewarded with numerous honors, official appointments, and offers of positions in the most prestigious German universities such as Munich, Cologne and Berlin (where he eventually joined the faculty).[160] Hermann Göring conferred on Schmitt the title of Prussian councilor of state. In June 1933, Schmitt was appointed a member of the newly created Akademie für deutsches Recht [Academy for German Law], which had "its full share" in drafting the vast part of the Nazi legislation, including the aforementioned Nuremberg Race Laws.[161]

Another group in which Schmitt played a major part was the Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrerbundes [University Instructors Group of the National Socialist Lawyers League]. This organization, presided over by Schmitt, held a conference on "Jewry in Jurisprudence" on October 3–4, 1936.[162] In his introductory comments before an audience of

156. Ibid., 98–99.

157. Ibid., 100; Stolleis, *Swastika*, 97.

158. Carl Schmitt, "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung* 40 (1935): 1133–35.

159. Carl Schmitt, "The Constitution of Freedom (1935)," in Jacobson and Schlink, *Weimar*, 323–25 (at 325). For the original, see Schmitt, "Verfassung," 1135.

160. Sherratt, *Philosophers*, 99.

161. Weinreich, *Professors*, 38.

162. Morris, "Discrimination," 121. Morris notes: "With new forms of legal discrimination against Jewish lawyers lagging behind economic discrimination and anti-Semitic rhetoric, Nazi academics inflamed the matter with a new forum for propaganda."

over one hundred jurists, Schmitt declared, "We must free the German spirit from all Jewish falsifications,"[163] reminding the audience that "year after year, semester after semester, for almost one hundred years thousands of young Germans, future judges and lawyers, have been schooled by Jewish legal teachers, that standard texts and commentaries in the most important legal disciplines are by Jews, that influential legal journals were dominated by them."[164] "The Jew's relationship to our intellectual work," he declared, "is parasitical, tactical and commercial."[165] Hence, he highlighted the "genuine battle of principles" between Jews' "cruelty and impudence" and Germans' "ethnic honor."[166]

Like many other German scholars,[167] legal and otherwise, Schmitt expressed strong support for the war.[168] For him, it was the means to establish Germany's place as the largest empire in Europe. The German Reich, "through species and origin, blood and soil," was destined to constitute not only a new internal, domestic order but also a new political reality and a new order of international law.[169] That new reality, centered on *Großräume*, would replace the "universalistic-humanitarian," that is, "Jewish"[170] existing world law. Under this new world order, the Reich's *völkisch* order would be finally freed from "the interference of spatially alien and un*völkisch* powers."[171]

---

163. Weinreich, *Professors*, 40.

164. Morris, "Discrimination," 121.

165. Sherratt, *Philosophers*, 101.

166. Ibid.

167. Weinreich notes the "complete unanimity of German scholarship as to the war" (*Professors*, 124).

168. Remy, *Heidelberg*, 96. Remy discusses the Aktion Ritterbusch, a project spearheaded by Paul Ritterbusch, a legal scholar who was the Rector of Kiel University, assembling "publications and lectures on war-related issues solicited from four to five hundred university professors representing twelve disciplines. Collectively, the endeavor produced 67 books and brochures, including 24 edited collections containing 299 different contributions." "Ritterbusch," writes Michael Stolleis, "conducted himself like a fervent National Socialist" (*History*, 293). See further the chapters in this volume by Suzanne L. Marchand and Thomas Schneider.

169. Carl Schmitt, "The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law," in *Writings on War*, trans. Timothy Nunan (Cambridge: Polity Press, 2011), 75–124 (at 111).

170. Schmitt, "*Großraum*," 121–22 ("The relation of a nation to a soil arranged through its own work of colonization and culture and to the concrete forms of power that arise from this arrangement is incomprehensible to the spirit of the Jew . . . Jewish authors . . . were here an important fermenting agent in the dissolution of concrete, spatially determined orders").

171. Ibid., 111.

V. THE DESCENT TO HELL

The story of the moral decline of German universities and professors in general, and of German law professors in particular, is one in which professional myopia, personal opportunism, moral weakness, and antisemitism were inexorably intermingled. For a significant group of legal intellectuals, Weimar's perceived failures stood in stark contrast to Germany's grandeur under Bismarck, and the culture and politics of endless debate and discussion to the image of the man of action and decision. This was especially the case for the generation of young scholars who ascended the ranks of academia as World War I came to an end, due not to the war but to the coincidental passing of older scholars. This new, younger generation of jurists was shaped by the war and by its disastrous outcomes.[172]

Furthermore, Weimar, with its leveling consequences of democratization,[173] did not sit well with the academic intellectual and social elitism that characterized German academia. Coming, as most of them did, from the nationalistically minded middle and upper classes of German society, academics "found it psychologically difficult to accept the reality created by the 'November revolution' and 'Versailles.'"[174] Political instability with constantly changing governments and petty party politicking, personal and financial insecurity with high inflation, coup attempts and a mounting crime rate, and even the perceived role of Weimar in promoting "sexual degeneracy"[175] resulted in the republic having very few supporters and many more vocal opponents among legal academics.[176] Many of the latter rejected the popular sovereignty at the

172. Stolleis, *History*, 24.

173. Grüttner, "Universities," 78.

174. Stolleis, *History*, 23. See also Hubert Rottleuthner, "Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development," *German Law Journal* 12 (2011): 100–14. As Rottleuthner points out: "Various items can be compiled on which the assumption might be based that the majority of jurists during the Weimar Republic shared a conservative, authoritarian, nationalistic, anti-republican attitude" ("Positivism," 105).

175. See Eric D. Weitz, *Weimar Germany: Promise and Tragedy* (Princeton, NJ: Princeton University Press, 2007), 330, and generally at 297–330.

176. Stolleis, *History*, 65. Stolleis puts matters thus: "In the eyes of the revolutionaries the [Weimar] constitution sealed the failure of the revolution and the betrayal by the majority socialists. For the monarchists it was the symbol of the hated 'Republic' imposed by the Allies. The extreme right generally rejected the parliamentary model. Federalists criticized the Unitarian tendencies, which they believed had come to be too strong. The Unitarians in turn lamented the powerful return of particularism and the unresolved problems of the reform of the Reich. The bourgeoisie found itself in a disastrous forced marriage with the majority socialists."

foundation of the Weimar Republic and either pined to replace it entirely with a sort of monarchical sovereignty like the one that existed before the war or sought to inject the Weimar constitution with attributes and features derived from that competing sovereignty.

Even those who begrudgingly accepted the republic argued for a strong role for its president. Most notably, the president was granted dictatorial powers to deal with emergencies under article 48 of the Weimar Constitution.[177] In crises it would be he, rather than parliament, who would steer the ship of the state and guide it to safety. The Weimar constitution was thus regarded as a "felicitous synthesis because it promised to reconcile the democratic and the monarchic elements"[178] with the president playing the role of its powerful guardian. Warnings that the president's dictatorial powers could be abused and misused had gone largely unheeded. Rather, "the stress of the times had forced men to whom arbitrary government had been lifelong anathema, to put into their model charter a device of emergency government that was a relic of the past and a possible platform for despotism. It was their hope and somewhat over-confident expectation that only good democrats devoted to the cause of the Republic would ever be in a position to resort to this unusual fund of power."[179]

Article 48 integrated into the constitutional system of the republic radical powers that could be traced back to the German empire's institution of the "state of war" and sought to add them to the menu of protective mechanisms available to the republic.[180] Under article 48, the president could use the armed forces to compel a state to fulfill its constitutional obligations. He was authorized, when in his opinion public safety and order were seriously disturbed or endangered, to take measures necessary for the restoration of public safety and order and could use the armed forces for that purpose.[181] Moreover, the

177. Gross and Ní Aoláin, *Emergency Powers*, 84–85.

178. Stolleis, *History*, 93.

179. Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), 35. Stolleis quotes Richard Schmidt, the speaker of the German Social Democratic Party (SPD), who, during the first reading of the draft of the constitution, cautioned: "We must reckon with the fact that one day another man from another party, perhaps from a reactionary party eager for a coup, will stand in this position. We must take precautions against such cases" (Stolleis, *History*, 49).

180. Rossiter, *Constitutional Dictatorship*, 33–37; John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford: Oxford University Press, 1991), 146.

181. As a matter of constitutional law, the president alone was authorized to judge whether such serious disturbance or danger to the public safety and order had in fact existed. See Finn, *Constitutions in Crisis*, 148.

president could temporarily suspend several of the fundamental rights guaranteed by the constitution. The use of article 48 was subject, theoretically, to certain limitations that were either explicitly prescribed in the constitution or implicit in the nature of the constitutional order.[182] However, in practice none of these limitations proved a meaningful obstacle to the exercise of unfettered dictatorial powers.

Between 1919 and 1932, article 48 was invoked more than 250 times.[183] It became a constitutional source for the promulgation of an extensive array of executive decrees, most frequently in the context of economic disturbances.[184] The extensive use of article 48 during the Weimar years led to a broad construction of the range of circumstances in which article 48 powers could be employed so as to encompass crises that did not fall within the traditional understanding of threats "endangering the public safety and order." For example, the German Reichsgericht announced that article 48 allowed the president to "take any measure necessary to the restoration of the public safety and order. . . . Absolutely everything that the circumstances demand is to be allowed him in warding off the dangers that imperil the Reich."[185] In fact, toward the end of the life of the Weimar Republic, especially within the context of the worldwide economic depression that dominated the late 1920s and early 1930s, article 48 was used as practically the exclusive legal source for governmental action, with the ordinary legislative and administrative processes virtually suspended.[186] In addition, the Reichstag—assigned the crucial role of a check on the powers of the president—proved to be no more than a rubber stamp to presidential emergency measures. With the collapse of parliamentary restraint on the presidency, combined with the president's use of the power to dissolve the Reichstag and

182. Rossiter, *Constitutional Dictatorship*, 65–68; Finn, *Constitutions in Crisis*, 149–51. Thus, for example, presidential actions under article 48 required ministerial countersignature. They were to be notified to the Reichstag and to be revoked upon the demand of the legislature. The constitution also made available various mechanisms for presidential accountability, such as impeachment or removal of the president from office and even making him the subject of criminal prosecution. Other limitations on the presidential powers under article 48 were implicit in the nature of the constitutional order; for example, they could only be employed for the purpose of restoring normal conditions, and thus were supposed to be of brief temporal duration to be revoked as soon as the goal of restoring public safety and order had been achieved. The presidential oath to observe and defend the constitutional provisions was similarly considered to impose limitations on the president's powers in this regard.

183. Finn, *Constitutions in Crisis*, 151–70; Rossiter, Constitutional Dictatorship, 37–60.

184. Rossiter, *Constitutional Dictatorship*, 51–53.

185. 55 RGStr. 115, quoted in Rossiter, *Constitutional Dictatorship*, 64.

186. Finn, *Constitutions in Crisis*, 165–68; Rossiter, *Constitutional Dictatorship*, 51–60.

employ article 48 emergency powers,[187] even that mechanism of control and supervision became a dead letter.

For their part, the German courts were not at any time a real factor in circumscribing presidential authoritarian powers. As Rossiter notes, the courts would, from time to time, "put the stamp of judicial approval upon the latitudinarian conception of the scope of these emergency powers."[188] Finally, and perhaps most importantly, the German people lacked any real sense of constitutionalism and deep appreciation of democracy, being accustomed to and supportive of an authoritarian regime.[189] And so it came to be, as Justice Robert Jackson was to observe years later, that when Hitler became chancellor in 1933, article 48 was ready to be used by the Nazis in order to finish off the republic.[190]

The chaotic conditions of the late 1920s and early 1930s, together with their own disposition to strong decisionistic leadership and what Oscar Hammen termed their "*Führer* consciousness,"[191] led many in legal academia to embrace an expansive interpretation of the dictatorial powers enshrined in article 48 and the circumstances for their use. However, prior to 1933, most law professors did not advocate (at least not openly) for the destruction of the republic. Even when the clouds of the storm were raging overhead, they clung to the traditionalist view of the academic's work as separate and removed from politics. Their authoritarian-flavored writings, opinions, and teachings had been, or so they pronounced to themselves and to others, apolitical. Of course, even at that early stage there had been voices in legal academia that supported the NSDAP and its agenda. But even professors such as Otto Koellreutter, who was among the very first to jump on the Nazi bandwagon, still wrote about the coming of the "national *Rechtsstaat*," apparently believing that Nazism and the rule of law could, somehow, be reconciled. In all, German universities, not merely the faculties of law, were primed for the advent of National Socialism. As Eric Weitz notes, "The major institutions like the churches, the army, schools and universities, and industrial organizations were largely hostile or recklessly indifferent

187. Rossiter, *Constitutional Dictatorship*, 55–57; Finn, *Constitutions in Crisis*, 162–63.

188. Rossiter, *Constitutional Dictatorship*, 70–71; Finn, *Constitutions in Crisis*, 151.

189. Rossiter, *Constitutional Dictatorship*, 71.

190. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For Justice Robert Jackson's concurring opinion, on the Weimar Republic and Hitler, see pp. 634–55 (at 650–51).

191. Oscar J. Hammen, "German Historians and the Advent of the National Socialist State," *Journal of Modern History* 13, no. 2 (1941): 161–88 (at 174). Hammen notes: "A significant principle in German history as expressed by most historians was the decisive role of a Führer in the destiny of a nation" (at 173).

to the republic, and those institutions were at the upper levels populated by the well-connected and the powerful."[192]

The academics' professional myopia was soon bolstered by rank personal opportunism. As noted previously, the Nazis' seizure of power in 1933 brought with it opportunities for advancement in academia. With almost a third of those teaching at law faculties removed from their positions, mostly on racial grounds, the vacant positions were filled, in short order, by untenured faculty demonstrating nationalistic orientation. By 1939, 60 percent of professors teaching in German law faculties had been appointed in or since 1933 with a majority of those belonging to the NSDAP. The swift purge of the legal profession—students, lawyers, judges, and professors—left practically no dissenting voices within the profession. Furthermore, as academic promotion was inexorably tied to support for the National Socialist cause, the newly promoted professors were at great pains to demonstrate their allegiance.

For all of the moral depravity of the many who willingly flocked to the Nazis' camp and cause, many legal scholars, judges, lawyers and law students simply remained silent in a self-imposed state of "voluntary coordination" with the Nazi machine.[193] Indeed, it was "striking how few legal philosophers emigrated or withdrew into the so-called 'inner emigration.'"[194] As Michael Stolleis notes, "We look in vain . . . for the members of the Association of Constitutional Lawyers in the circles of active resistance. Officers, clergy, students, and workers were represented, but as far as we know not a single professor of constitutional and administrative law."[195] This was all the more odious where university professors were involved since German professors had been revered by their compatriots. Their position in that respect was unparalleled anywhere outside of Germany.[196] That position conferred on them a unique opportunity to resist the new regime. They "commanded a great deal of respect and easily could have assumed leadership positions had they so desired."[197]

Last, but certainly not least, the seizure of power by the Nazis also made it acceptable, indeed desirable, to express one's antisemitic sentiments. If in the Weimar years such sentiments had been overtly expressed by the Communists

192. Weitz, *Weimar*, 366.

193. For the medical establishment, see similarly Michael H. Kater, *Doctors under Hitler* (Chapel Hill, NC: University of North Carolina Press, 1989), 19.

194. Kaufmann, "Jurisprudence," 1633; Morris, "Discrimination," 124.

195. Stolleis, *Swastika*, 99.

196. Grüttner, "Universities," 77 (quoting Carl Heinrich Becker describing the power of full Professors as "nearly absolute").

197. Sims, "Historians," 247.

on the left, Nazism allowed for such expressions to come from the right wing of the political spectrum, where most professors already belonged. "Jewish" content could and was poured into legal vessels that appeared not to be antisemitic to start with. Thus, the "international" and "other" that had been posited in contradistinction to the "national" and "German" became associated first and foremost with Jews and that which was Jewish.

VI. THE MYTH OF DEFENSELESS LAWYERS AND THE PANACEA OF NATURAL LAW

In a famous article published in 1945, Gustav Radbruch, a former minister for justice in the Weimar Republic and a Professor of Law in Heidelberg dismissed from that position as part of the purges of 1933, wrote that legal positivism, with its central theory that "law is law," had "rendered jurists and the people alike defenceless [*sic*] against arbitrary, cruel, or criminal laws, however extreme they might be."[198] Radbruch, a former leading legal positivist, now called for the return to a natural law legal thinking, having concluded that legal positivism was responsible for the conduct of jurists during the Nazi era.

Legal positivists adhered to the distinction and separation of law from morality, "is" from "ought to be."[199] For positivists, "a law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."[200] According to Hans Kelsen, "the validity of a positive legal order does not depend on its conformity with some moral system."[201] As soon as the war had ended, the charge was made that the majority of the German legal profession were positivists and that their unwillingness to inquire into the morality of law "led to an easy capture of the legal system by the Nazis and facilitated its modification to meet evil Nazi goals."[202]

198. Gustav Radbruch, "Five Minutes of Legal Philosophy (1945)," trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies* 26 (2006): 13–15 (at 13). See also Frank Haldemann, "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law," *Ratio Juris* 18 (2005): 162–78.

199. See Brian Bix, *Jurisprudence: Theory and Context*, 8th ed. (London: Sweet and Maxwell, 2019), 33–34.

200. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble, rev. ed., Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1995), 157.

201. Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 67.

202. James E. Herget, *Contemporary German Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1996), 2.

Positivism, the argument went, had not provided a basis on which to reject evil laws and immoral legal systems. For the positivist, an evil legal system, such as that put forward by the Nazis, was still a legal system. A law which was morally evil but that was properly (i.e., procedurally appropriately) promulgated was still a valid law that needed to be obeyed and complied with. The remedy, as per Radbruch and others, was the return to natural law and to the recognition of law that lay beyond positive statutes. Others have strenuously argued that legal positivism had little, if anything, to do with the way in which jurists conducted themselves in the face of Nazism.[203]

Alas, it seems that much of the debate about positivism's role in the shift from Weimar to the Third Reich and during the twelve years of the Nazi regime, as well as the arguments regarding natural law as a panacea for the ills of positivism in this regard, lack nuance and provide cover, rather than clarity. First, it is not clear at all that positivism was, in fact, the dominant theory in Germany prior to the Nazi seizure of power. As Rottleuthner comments, "One could group together those authors who called themselves at that time 'positivists.' Besides Hans Kelsen, however, there would not be many. When one says 'positivist'—one means most often the Others."[204] Second, if one were to adopt the claim that positivism was the dominant theory, the further claim that positivists could not and would not challenge state authority would be clearly at odds with the willingness of law professors, judges and lawyers to challenge the authority of the Weimar Republic.[205] As Dubber notes: "The same judges who applied eugenic laws after 1933 had not felt compelled by their sense of loyalty to the Weimar government to apply the laws of the republic."[206] In fact, during the Weimar years it had been legal positivism, rather than antipositivism, that tried but ultimately failed to defend the republic and democracy.[207]

---

203. See, for example, Richard A. Posner, "Courting Evil," *New Republic* 204, no. 24 (June 17, 1991): 36–41, and famously H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629.

204. Rottleuthner, "Positivism," 102. Rottleuthner also argues that "positivism as a philosophy or theory of law . . . was by no means the dominant perspective during the Weimar period, and also not in the public law theory" (106).

205. Shklar, *Legalism*, 72.

206. Markus Dirk Dubber, "Judicial Positivism and Hitler's Injustice," *Columbia Law Review* 93 (1993): 1807–31 (at 1824).

207. Peter C. Caldwell, "Legal Positivism and Weimar Democracy," *American Journal of Jurisprudence* 39 (1994): 273–301. As Caldwell argues, "as long as the Weimar Constitution remained in force, legal positivism served, not as a handmaiden of fascism, but as a bulwark against it in theoretical discussions, and a guarantee that social forces had access to the process of state will-formation" (at 278).

There is a third and more significant problem with blaming legal positivism for the failure of German law professors, judges, and lawyers to oppose the Nazi regime. It was the Nazis themselves who called for the unification of law and morality, a stance in direct opposition to the positivist worldview.[208] Practically each and every one of the Nazi legal theorists discussed in sections 1 and 2 of this chapter had made the claim that law must conform to the values of National Socialism, calling for the elimination of the distinction between law and (Nazi) morality. Positivism was castigated as responsible for the "ethical disorientation" of Germany under the Weimar Republic[209] and as a theory reflecting "intellectual foreign (i.e., Jewish) infiltration,"[210] separating law from its connectedness to "national (i.e., German) mores."[211] Carl Schmitt celebrated the end of the era of legal positivism while Karl Larenz argued that "law [was] an order closely connected with the moral and religious life of the community." Morality was not left as a matter for individuals as such but rather was a matter for the whole community, and it was with the mores of the volk that positive legal norms must align and comport.[212] It was precisely under National Socialism that the distinction between moral duty and legal duty collapsed. Thus, Rottleuthner argues correctly: "After 1933 . . . [i]nstead of [positivism's] value-blindness we find the most abundant adjuration of law and justice by the legal philosophers, an ecstasy of values in face of the German legal state of Adolf Hitler. Instead of defenselessness we find efforts to ingratiate themselves in the form of declarations of loyalty. . . . Instead of defenselessness, one should rather speak of lack of contradiction—on the ground of inclination, agreement or 'to prevent something worse.'"[213] Indeed, "the fusion of law and morality serv[ed] the NS-jurists as a welcome means to extend the authority and power of the Nazi regime."[214] It was not inattention to values that marred the postwar reputation of the German legal profession but rather devotion to a base and odious set of values.

---

208. Ibid., 276–77. Caldwell writes that "far from excluding natural law from judicial practice, the Nazis developed a kind of secular, biological 'natural law' of race and nation."

209. Forsthoff, *Totale Staat*, 13.

210. Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, Recht und Staat 109 (Tübingen, Germany: J. C. B. Mohr, 1934), 11.

211. Ibid., 12.

212. Ibid., 9.

213. Rottleuthner, "Positivism," 108.

214. Herlinde Pauer-Studer, "Kelsen's Legal Positivism and the Challenge of Nazi Law," in *European Philosophy of Science: Philosophy of Science in Europe and the Viennese Heritage*, ed. Maria Carla Galavotti, Elisabeth Nemeth, and Friedrich Stadler, Vienna Circle Institute Yearbook 17 (Cham, Switzerland: Springer, 2014), 223–40 (at 236).

Thus, National Socialism benefited from a perfect storm of legal theory. While legal positivists were, by and large, supportive of the Weimar Republic and democracy, they had been "unable to respond"[215] effectively when the constitutional order crumbled and the Nazis seized power. Moreover, positivism then "permitted lawyers to rationalize to themselves and others their interpretation and application of laws they might, upon reflection, have considered to be grotesquely unjust or immoral."[216] Antipositivists who hailed the unity of law and morality undermined the foundations of the Weimar constitution by "grant[ing] legitimacy to the judiciary and president as they usurped power from the Reichstag."[217] Furthermore, once the Nazis seized power the same jurists were quick to tie the law to the mast of Nazi morality. As Rottleuthner argues: "It would be naïve to appeal to natural law against the Nazis, realizing that the Nazis had their own natural law. . . . It would be naïve to speak of the *Rechtsstaat* as a guarantee against injustice without taking into consideration what the Nazis meant by the '*Rechtsstaat Adolf Hitlers*'. . . . We can learn from the Nazi era that everything can be justified."[218]

VII. THE HEIDELBERG MYTH

The end of the Second World War saw the evolution in postwar Germany of a myth erected on the foundations of a collective "culture of forgetting."[219] Steven Remy defines what he calls the "Heidelberg myth" as a network of elaborate narratives that served to absolve of connection to National Socialism all but a few professors and served as a shield against (mostly) American denazification policies after the war.[220] The myth consisted of the claims that the number of "genuine Nazis" on faculties was very small and that they had been imposed on the universities by the Nazi regime against the opposition of the professoriate.[221] The Heidelberg myth, which was in no way limited to that one university, facilitated a "stunning continuity"[222] post-1945 in that "[German] law professors teach, students study, lawyers cite, and judges rely on the views of many of the scholars that [had been] enthusiastic supporters of the Nazi

215. Caldwell, "Positivism," 278.
216. Dubber, "Hitler's Injustice," 1826.
217. Caldwell, "Positivism," 287.
218. Rottleuthner, "Positivism," 113.
219. Remy, *Heidelberg*, 218–33.
220. Ibid., 240–41.
221. Ibid., 241.
222. For analysis of the reasons for such continuity, see Reimann, "Continuity," 1655–59.

regime."[223] Indeed, "continuity of academic careers was the rule rather than the exception."[224] By and large, former Nazi supporters were able to return to or maintain their academic positions relatively easily, while those fired for racial or ideological reasons, or the very few who resigned for similar reasons, "were much less welcome."[225] Thus, "after 1945, the law faculties consisted almost exclusively of professors who had served in the previous period. This meant, virtually by definition, that they were either favorably inclined to National Socialism, or indifferent, or at least not strongly opposed."[226]

When the war ended, Carl Schmitt, who staunchly refused to undergo denazification, was barred from holding academic jobs. He returned to his hometown of Plettenberg, where he lived to the ripe age of ninety-six. While no longer a university professor, many continued to seek his company and his ideas continued to influence generations of Germans.[227] However, to the extent that the unrepentant Schmitt had been made to answer for his Nazi past, his was the exception to the general rule. As Michael Stolleis comments, after 1945, it was "enough to single out a few 'black sheep,'" one of whom was Carl Schmitt, who was unable to resume his university position, to show that cleansing had occurred. However, "beyond that, the attitude was that anybody who had not been 'excessively' National Socialist, who had merely commented on the prevailing law, could soon return, perhaps clutching a democratic textbook on constitutional theory under his arm."[228]

Otto Koellreutter refused to undergo the formal denazification process. He was tried and sentenced to five years in prison, leading to his imprisonment in June 1947. However, he was released just over a year later, after an appeals court held that he had been merely a "fellow traveler." This also resulted in overturning his dismissal from the university and the resumption of his academic

223. Reimann, "Continuity," 1652. As Reimann trenchantly comments there: "Many of the Nazis' staunchest intellectual supporters rose to academic and political power and fame in reconstructed West Germany. The number is enough to fill a book."

224. Ibid., 1654.

225. Ibid., 1656–57. Only 17 percent of those who had lost their academic positions after 1933 were able to return to the law faculties.

226. Ibid., 1656. Remy also notes the "continuities in both personnel and research agendas before and after National Socialism" (*Heidelberg*, 3, 5).

227. As Remy notes: "By the late 1940s, former students like Forsthoff and younger admirers of Schmitt had formed an organization, Academia Moralis, and several informal circles that served not only to keep Schmitt's ideas alive but also to provide a kind of support network for former Nazis" (*Heidelberg*, 223).

228. Stolleis, *Swastika*, 88.

position until retirement in 1952.[229] Karl Larenz, who had initially been banned from teaching after the war, resumed his position in Kiel in 1949. In 1960, he was appointed to a chair at the University of Munich, where he remained until his retirement. Ernst Forsthoff had initially been removed from the Heidelberg faculty in 1946 at the insistence of the Americans (and despite support by the university senate for his retention)[230] after being charged by the Heidelberg Spruchkammer in November of that year.[231] However, he resumed his teaching career four years later and soon thereafter was reappointed to his former full Professorship.[232] Forsthoff then became "the leading transmitter of Carl Schmitt's ideas to West German academic culture."[233]

Theodor Maunz's teaching career at the University of Freiburg remained uninterrupted until 1952, when he moved to the Ludwig Maximilian University in Munich, teaching there until his retirement. The high esteem in which he had been held was evident when he was elected, in 1948, to be a member of the constitutional convention that drafted the new constitution for West Germany. This, together with the publication of his authoritative commentary on the constitution (published in 1958), established Maunz, as noted earlier, as a leading expert on the West German constitution and earned him the moniker of "der Kronjurist des Grundgesetzes."[234] Maunz's postwar career was not entirely free of reminders of his enthusiasm for Nazi ideas in the past, however. Though he served as the minister of education in Bavaria from 1957 to 1964, he was forced to resign that position after his pro-Nazi publications were brought to light.[235] Nonetheless, Maunz held on to his position at the university.[236] It was only three decades later, in 1993, that his image was tarnished posthumously. This occurred not due to his pro-Nazi writings before 1945 but to the discovery that Maunz had written hundreds of anonymous articles for a right-radical postwar newspaper. He had also prepared scores of legal opinions for the party—the German People's Union

229. Jörg Schmidt, *Otto Koellreutter, 1883–1972: Sein Leben, sein Werk, seine Zeit*, Rechtshistorische Reihe 129 (Frankfurt, Germany: Peter Lang, 1995), 135–37.

230. Remy, *Heidelberg*, 158.

231. Ibid., 191.

232. Ibid., 193–94.

233. Ibid., 222.

234. Mauz, "Wütend."

235. Konrad Redeker, "Bewältigung der Vergangenheit als Aufgabe der Justiz," *Neue Juristische Wochenschrift* 17, no. 24 (1964): 1097–1100 (at 1098).

236. "Bavarian Minister of Education Resigns; Justified Nazi Laws on Jews," *Jewish Telegraphic Agency*, July 14, 1964.

(DVU)—with which that paper was associated and whose leader described Maunz as "a quarter-century . . . wonderful [and] loyal companion and authoritative adviser."[237]

VIII. THE ACCOUNTABILITY OF THE SCHOLAR: WHAT A TOPIC THAT WOULD MAKE!

For ten out of twelve people in my paternal grandfather's immediate family in Poland (four of them young children), the Final Solution exercised by the murderous Nazi machine was no political exercise or theoretical debate. It was their "existential negation." Unlike Carl Schmitt, they neither lived to be ninety-six years old nor fulfilled their individual potential, because they had been decreed to be the public enemy and, for so many of Schmitt's ilk, also a very private enemy. Saul Lande, my maternal grandfather, was luckier. He merely lost his career, not his life, on the altar of racial homogeneity of the legal profession—necessary, according to Schmitt, in order to achieve determinacy and predictability in the legal order.

While legal scholars did not, by and large, participate directly in the crimes perpetrated by the Nazis, they facilitated those by conferring a veneer of legality and legitimacy to the actions of the regime. As Stolleis notes, "The responsibility of a constitutional lawyer as teacher, scholar, expert witness, and counsel, against the backdrop of what we have learned from cases like that of Maunz—what a topic that would make!"[238] The support of legal scholars made it possible for the Nazi leadership to proclaim, and for ordinary Germans to accept the claim, that theirs was, when all was said and done, a Rechtsstaat. The role of the professors' failure to protect and defend the very basic values of democracy, liberty, and civilization and, indeed, their active role in dismantling those and substituting them for National Socialist values was captured poignantly by Victor Klemperer:

> If one day the situation were reversed and the fate of the vanquished lay in my hands, then I would let all the ordinary folk go and even some of the leaders. . . . But I would have all the intellectuals strung up, and the professors three feet higher than the rest; they would be left hanging from the lampposts for as long as was compatible with hygiene.[239]

---

237. Mauz, "Wütend"; Stolleis, *Swastika*, 185–92.

238. Stolleis, *Swastika*, 189.

239. Victor Klemperer, *I Will Bear Witness: A Diary of the Nazi Years, 1933–1941*, trans. Martin Chalmers (New York: Modern Library, 1999), 184.

BIBLIOGRAPHY

Aderet, Ofer. "A Jew from Palestine Was Awarded Law Degree from Nazi Germany, Exhibition Reveals." *Ha'Aretz*, April 18, 2012. Accessed January 23, 2018. https://www.haaretz.com/jewish/1.5214906.

Austin, John. *The Province of Jurisprudence Determined*. Edited by Wilfrid E. Rumble. Rev. ed. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press, 1995.

"Bavarian Minister of Education Resigns; Justified Nazi Laws on Jews." *Jewish Telegraphic Agency*, July 14, 1964. https://www.jta.org/1964/07/14/archive/bavarian-minister-of-education-resigns-justified-nazi-laws-on-jews.

Bix, Brian. *Jurisprudence: Theory and Context*. 8th ed. London: Sweet and Maxwell, 2019.

Caldwell, Peter C. "Ernst Forsthoff and the Legacy of Radical Conservative State Theory in the Federal Republic of Germany." *History of Political Thought* 15, no. 4 (1994): 615–41.

———. "Ernst Forsthoff in Frankfurt: Political Mobilization and the Abandonment of Scholarly Responsibility." In *"Politisierung der Wissenschaft": Jüdische Wissenschaftler und ihre Gegner an der Universität Frankfurt am Main vor und nach 1933*, edited by Moritz Epple, Johannes Fried, Raphael Gross, and Janus Gudian, 249–84. Schriftenreihe des Frankfurter Universitätsarchivs 5. Göttingen, Germany: Wallstein, 2016.

———. "Legal Positivism and Weimar Democracy." *American Journal of Jurisprudence* 39 (1994): 273–301.

———. *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism*. Durham, NC: Duke University Press, 1997.

Carty, Anthony. "Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt." *Cardozo Law Review* 16 (1995): 1235–92.

Cristi, Renato. *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*. Cardiff, UK: University of Wales Press, 1998.

Dubber, Markus Dirk. "Judicial Positivism and Hitler's Injustice." *Columbia Law Review* 93 (1993): 1807–31.

Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge: Cambridge University Press, 2006.

———. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*. Oxford: Oxford University Press, 1997.

———. "'Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen." *Cardozo Law Review* 16 (1994): 1–19.

Finn, John E. *Constitutions in Crisis: Political Violence and the Rule of Law*. Oxford: Oxford University Press, 1991.

Forsthoff, Ernst. *Der Totale Staat*. Hamburg, Germany: Hanseatische Verlagsanstalt, 1933.
Galli, Carlo. "Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning." *Cardozo Law Review* 21 (2000): 1597–617.
Gross, Oren, and Fionnuala Ní Aoláin. *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press, 2006.
Gross, Rina. Interview by author, April 18, 2012. Tel Aviv.
Grüttner, Michael. "German Universities under the Swastika." In *Universities under Dictatorship*, edited by John Connelly and Michael Grüttner, 75–111. University Park: Pennsylvania State University Press, 2005.
Haldemann, Frank. "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law." *Ratio Juris* 18 (2005): 162–78.
Hammen, Oscar J. "German Historians and the Advent of the National Socialist State." *Journal of Modern History* 13, no. 2 (1941): 161–88.
Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71 (1958): 593–629.
Hartshorne, Edward Yarnall, Jr. *The German Universities and National Socialism*. Cambridge, MA: Harvard University Press, 1937.
Herf, Jeffrey. *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich*. Cambridge: Cambridge University Press, 1984.
Herget, James E. *Contemporary German Legal Philosophy*. Philadelphia: University of Pennsylvania Press, 1996.
Jacobson, Arthur J., and Bernhard Schlink, eds. *Weimar: A Jurisprudence of Crisis*. Translated by Belinda Cooper. Philosophy, Social Theory, and the Rule of Law 8. Berkeley: University of California Press, 2000.
Kater, Michael H. *Doctors under Hitler*. Chapel Hill: University of North Carolina Press, 1989.
Kaufmann, Arthur. "National Socialism and German Jurisprudence from 1933 to 1945." *Cardozo Law Review* 9 (1988): 1629–49.
Kelsen, Hans. *Pure Theory of Law*. Translated by Max Knight. Berkeley: University of California Press, 1967.
Kierkegaard, Søren. *"Repetition" and "Philosophical Crumbs."* Translated by M. G. Piety. Oxford World's Classics. Oxford: Oxford University Press, 2009.
Klemperer, Victor. *I Will Bear Witness: A Diary of the Nazi Years, 1933–1941*. Translated by Martin Chalmers. New York: Modern Library, 1999.
Koellreutter, Otto. *Parteien und Verfassung im heutigen Deutschland*. Leipzig, Germany: Hirschfeld, 1932.
———. *Vom Sinn und Wesen der Nationalen Revolution*. Recht und Staat in Geschichte und Gegenwart 101. Tübingen, Germany: J. C. B. Mohr, 1933.
Koonz, Claudia. *The Nazi Conscience*. Cambridge, MA: Belknap Press of Harvard University Press, 2003.

Lang, Hubert. *Zwischen allen Stühlen: Juristen jüdischer Herkunft in Leipzig (1848–1953)*. Leipzig, Germany: Biographiezentrum, 2014.

Larenz, Karl. *Deutsche Rechtserneuerung und Rechtsphilosophie*. Recht und Staat 109. Tübingen, Germany: J. C. B. Mohr, 1934.

Maunz, Theodor. *Neue Grundlagen des Verwaltungsrechts*. Der Deutsche Staat der Gegenwart 9. Hamburg, Germany: Hanseatische Verlagsanstalt, 1934.

———. *Verwaltung*. Hamburg, Germany: Hanseatische Verlagsanstalt, 1937.

Mauz, Gerhard. "Ich bin nicht nur wütend." *Der Spiegel*, October 18, 1993. http://www.spiegel.de/spiegel/print/d-13680349.html.

McCormick, John P. *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*. Cambridge: Cambridge University Press, 1997.

Meinel, Florian. "Ernst Forsthoff and the Intellectual History of German Administrative Law." *German Law Journal* 8 (2007): 785–99.

Morris, Douglas G. "Discrimination, Degradation, Defiance: Jewish Lawyers under Nazism." In *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, edited by Alan E. Steinweis and Robert D. Rachlin, 105–35. New York: Berghahn, 2013.

Müller, Ingo. *Hitler's Justice: The Courts of the Third Reich*. Translated by Deborah Lucas Schneider. Cambridge, MA: Harvard University Press, 1991.

Neumann, Franz L. *Behemoth: The Structure and Practice of National Socialism, 1933–1944*. 2nd ed. Oxford: Oxford University Press, 1944. Reprinted with an introduction by Peter Hayes. Chicago: Ivan R. Dee, 2009.

Neumann, Volker. "Carl Schmitt: Introduction." In Jacobson and Schlink, *Weimar*, 280–89.

Pauer-Studer, Herlinde. "Kelsen's Legal Positivism and the Challenge of Nazi Law." In *European Philosophy of Science: Philosophy of Science in Europe and the Viennese Heritage*, edited by Maria Carla Galavotti, Elisabeth Nemeth, and Friedrich Stadler, 223–40. Vienna Circle Institute Yearbook 17. Cham, Switzerland: Springer, 2014.

Posner, Richard A. "Courting Evil." *New Republic* 204, no. 24 (June 17, 1991): 36–41.

Radbruch, Gustav. "Five Minutes of Legal Philosophy (1945)." Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. *Oxford Journal of Legal Studies* 26 (2006): 13–15.

Redeker, Konrad. "Bewältigung der Vergangenheit als Aufgabe der Justiz." *Neue Juristische Wochenschrift* 17, no. 24 (1964): 1097–1100.

Reimann, Mathias. "National Socialist Jurisprudence and Academic Continuity: A Comment on Professor Kaufmann's Article." *Cardozo Law Review* 9 (1988): 1651–62.

Rein, Gustav Adolf. *Die Idee der politischen Universität*. Hamburg, Germany: Hanseatische Verlagsanstalt, 1933.

Remy, Steven P. *The Heidelberg Myth: The Nazification and Denazification of a German University*. Cambridge, MA: Harvard University Press, 2002.
Ringer, Fritz K. *The Decline of the German Mandarins: The German Academic Community, 1890–1933*. Hanover, NH: University Press of New England, 1969.
Rossiter, Clinton L. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton, NJ: Princeton University Press, 1948.
Rottleuthner, Hubert. "Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development." *German Law Journal* 12 (2011): 100–14.
Scheuerman, William E. "After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933–1936." *Cardozo Law Review* 19 (1998): 1743–69.
———. *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*. Cambridge, MA: MIT Press, 1994.
Schmidt, Jörg. *Otto Koellreutter, 1883–1972: Sein Leben, sein Werk, seine Zeit*. Rechtshistorische Reihe 129. Frankfurt, Germany: Peter Lang, 1995.
Schmitt, Carl. *The Concept of the Political*. Translated by George Schwab. New Brunswick, NJ: Rutgers University Press, 1976. Reprinted and expanded, Chicago: University of Chicago Press, 2007.
———. "Die Verfassung der Freiheit." *Deutsche Juristen-Zeitung* 40 (1935): 1133–35. Translated by Belinda Cooper as "The Constitution of Freedom (1935)." In Jacobson and Schlink, *Weimar*, 323–25.
———. "The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law." In *Writings on War*, 75–124. Translated by Timothy Nunan. Cambridge: Polity Press, 2011.
———. *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. Translated by George Schwab and Erna Hilfstein. Westport, CT: Greenwood, 1996. Reprinted with a foreword by Tracy B. Strong, Chicago: University of Chicago Press, 2008.
———. *Political Romanticism*. Translated by Guy Oakes. Cambridge, MA: MIT Press, 1986.
———. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Cambridge, MA: MIT Press, 1985.
———. "Was bedeutet der Streit um den 'Rechtsstaat'?" *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935): 189–201.
Schwab, George. *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*. 2nd ed. New York: Greenwood Press, 1989.
Sherratt, Yvonne. *Hitler's Philosophers*. New Haven, CT: Yale University Press, 2013.
Shklar, Judith N. *Legalism: Law, Morals, and Political Trials*. Cambridge, MA: Harvard University Press, 1964.

Sims, Amy R. "Intellectuals in Crisis: Historians under Hitler." *Virginia Quarterly Review* 54, no. 2 (1978): 246–62.
Stolleis, Michael. *A History of Public Law in Germany, 1914–1945*. Translated by Thomas Dunlap. Oxford: Oxford University Press, 2004.
———. "Law and Lawyers Preparing the Holocaust." *Annual Review of Law and Social Science* 3 (2007): 213–31.
———. *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Translated by Thomas Dunlap. Chicago: University of Chicago Press, 1998.
Strauss, Leo. "Notes on Carl Schmitt, *The Concept of the Political*." Translated by J. Harvey Lomax. In Schmitt, *Concept of the Political*, 97–122 (expanded edition).
Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10: Nuernberg, October 1946–April 1949. Vol. 3, *"The Justice Case" (The United States of America v. Altstoetter et al.)*. Washington, DC: United States Government Printing Office, 1951.
Weber, R. G. S. *The German Student Corps in the Third Reich*. Basingstoke, UK: Palgrave Macmillan, 1986.
Weinreich, Max. *Hitler's Professors: The Part of Scholarship in Germany's Crimes against the Jewish People*. New York: Yiddish Scientific Institute (YIVO), 1946. Reprinted with a foreword by Martin Gilbert. New Haven, CT: Yale University Press, 1999.
Weitz, Eric D. *Weimar Germany: Promise and Tragedy*. Princeton, NJ: Princeton University Press, 2007.
Youngstown Sheet & Tube Co. v. Sawyer. 343 U.S. 579 (1952).

OREN GROSS is the Irving Younger Professor of Law at the University of Minnesota Law School. He holds an LLB degree magna cum laude from Tel Aviv University and LLM and SJD degrees from Harvard Law School. He has taught and held visiting positions in prominent institutions, such as Harvard Law School and Princeton University. His work has been published extensively in leading academic journals, such as the *Yale Law Journal* and *Yale Journal of International Law*. His book *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge, 2006) was awarded the prestigious Certificate of Merit for Preeminent Contribution to Creative Scholarship by the American Society of International Law in 2007. His most recent book, *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (edited with Fionnuala Ni Aoláin), was published by Cambridge in 2013. In 2017, he received the Stanley V. Kinyon Tenured Faculty of the Year Award, University of Minnesota Law School.